

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERROD, TEED, VANDERHAGEN)
and WARE,)
)
Plaintiffs,)
) Civil Case No.
)
-vs-) 5:17-cv-10164-JEL
)
VNA and LAN,)
)
Defendants.)

STATUS CONFERENCE
BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE
Ann Arbor, Michigan - Tuesday, May 17, 2022

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1 Tuesday, May 17, 2022

2 4:01 p.m.

3 -- --- --

4 THE CLERK OF THE COURT: The United States District
5 Court of Michigan is now in session. The Honorable Judith E.
6 Levy presiding. Calling Sherrod, Teed, Vanderhagen and Ware
7 versus VNA and LAN.

8 THE COURT: Could I have appearances, please.

9 MR. STERN: Good afternoon, Your Honor, Corey Stern,
10 Moshe Maimon and Melanie Daly for the plaintiffs.

11 THE COURT: Thank you.

12 MR. CAMPBELL: Good afternoon, Your Honor, James
13 Campbell, Daniel Stein and I see Cheryl Bush for VNA.

14 THE COURT: Okay. Good. Thank you.

15 MR. MASON: Your Honor, Wayne Mason. I believe David
16 Kent is on and Jude Hickland. Jude Hickland may not be on, but
17 Wayne Mason and David Kent.

18 THE COURT: Okay. I don't see Mr. Hickland, but I do
19 see Mr. Stein and Mr. Kent.

20 MR. MASON: Mr. Stein is with VNA.

21 THE COURT: Of course, I know. But he was right there
22 where I thought Mr. Kent was and they moved places on my screen
23 right as I spoke. So I just spoke the name that I was looking
24 at.

25 Okay. All right. Does anybody else want to make an

1 appearance?

2 We have Mr. Berg for the city of Flint, Mr. Lanciotti
3 also with the Napoli firm, and Ms. Bush. I see her now.

4 Well, here is what we had set this time so that we
5 could discuss the situation with Juror Number Nine, which we'll
6 do in a moment. I didn't set up a YouTube feed or a public
7 Webinar just because it would be relating to her personal
8 health information and I didn't see a point in widely
9 broadcasting that, but there's certainly -- this is not sealed.
10 Anyone is welcome to be here and it can be provided immediately
11 to any member of the public or the media who has any interest
12 in it.

13 So why don't we start with the issue of the proposed
14 curative instruction. And I received an e-mail from Mr. Maimon
15 regarding a proposal and I received -- and, yeah, that's the
16 e-mail I received today.

17 And, of course I have VNA's proposed curative
18 instruction that was handed to me this morning.

19 In light of the fact that Mr. Maimon has written a
20 substantive e-mail and a proposed instruction, I suppose I
21 should -- I would be interested in hearing from Mr. Campbell
22 whether that changes your thought on your proposed curative
23 instruction?

24 MR. CAMPBELL: Your Honor, it doesn't at all. And,
25 you know, we still think that the proper remedy given the

1 situation is the mistrial, but we understand that, you know, it
2 was denied and that's the status. But this proposed
3 instruction really makes matters worse. It doesn't strike the
4 evidence. It doesn't tell the jury that they may not consider
5 reduction of present value. To the contrary, it says that the
6 evidence understanding between the difference of undiscounted
7 versus discounted values when and if you consider an award of
8 future damages.

9 That implies that the jury's award of damages should
10 be based in part on that difference. Why else is the
11 understanding relevant. That's the very prejudice that's
12 created.

13 In our view, in VNA's view, Your Honor, the
14 instruction has to -- must tell the jury that it may not
15 consider present value or discount any present value in its
16 deliberations. Any instruction that doesn't contain that
17 admonition fails to address the prejudice and indeed without
18 that admonition, the instruction would only draw further
19 attention to present value reductions, thereby increasing the
20 prejudice.

21 We believe the evidence that Dr. Crakes permitted was
22 improper and should be stricken. His report, we cite the
23 statute and I continue to say that the statute says that this
24 is a matter for the Court after the verdict and it speaks in
25 terms of shall be reduced.

1 So we stand on our objection.

2 THE COURT: You faded out there, Mr. Campbell.

3 MR. CAMPBELL: I'm sorry. The instruction that we
4 submitted is the one that given Your Honor's ruling on
5 mistrial, if this is the route that we go, we strongly urge
6 that that's the instruction that we use.

7 THE COURT: Mr. Mason?

8 MR. MASON: Thank you, Your Honor. Again, for the
9 record, we believe that the appropriate remedy is mistrial.
10 But since we're talking about a curative instruction, we
11 believe that the submission by the plaintiffs is wholly
12 inappropriate and does nothing more than draw more attention to
13 the misdeeds that had occurred with respect to this issue.

14 And the case law even that the Court cited, we don't
15 believe supports this in any way. Their submission -- their
16 submission once again would reward the fact that this was
17 inappropriately demonstrated to the jury already.

18 So the very nature of what they proposed would
19 exacerbate the problem that already exists and, therefore, we
20 respectfully request that the Court adopt VNA's proposed
21 curative instruction and we're fine with the one change that
22 Your Honor mentioned in court earlier today.

23 THE COURT: And I'll certainly give Mr. Maimon an
24 opportunity to respond. Would you be the one speaking,
25 Mr. Maimon?

1 MR. MAIMON: I will be, Your Honor.

2 THE COURT: Okay. Here's the situation from my
3 perspective: First of all, the motion for a mistrial was
4 denied. And with the benefit of a short period of time today
5 to take another look at this, it is denied with the full force
6 of any of the relevant -- all of the relevant case law that we
7 have been able to determine. So I have no doubt about that.
8 And I'll be putting that into a very short written order to
9 supplemental what was said on the record.

10 But in addition to the *Hashem*, H-a-s-h-e-m, case that
11 I mentioned this morning and that Mr. Maimon references,
12 there's also *Settingington versus Pontiac General Hospital*. I'm
13 sure you have looked at that this afternoon. But there, the
14 trial court instructed the jury to do the discounting and the
15 Court of Appeals said whatever. That's fine. As long as it
16 gets done, it doesn't matter. The point of the Michigan
17 statute is just to ensure that it gets done at some point.

18 So the fact that that jury must have heard about
19 discounted numbers and was then instructed to discount, was not
20 any type of error according to the Michigan Court of Appeals in
21 1997. So I think that in light of those two cases as well as
22 the Michigan Civil Jury Instruction, pattern instruction,
23 there's simply no error.

24 So then we have to look at, okay, how did we get to --

25 MR. CAMPBELL: Your Honor? If I can just address the

1 case, the *Settingington* case?

2 THE COURT: Sure.

3 MR. CAMPBELL: It looks like it's Section 10 of the
4 opinion. The reason why that wasn't an issue in the case is
5 it's because the defense counsel specifically requested that
6 the jury be instructed to reduced future damage to present cash
7 value. It was the defense that did --

8 THE COURT: Sure. But if it was -- if it was
9 Black-letter law in Michigan that a jury may not know anything
10 about present value, then it would be an error one way or
11 another. But I hear you, that it was the defense request.

12 But the fact that Dr. Crakes did this so that the jury
13 would understand the difference between discounted and
14 undiscounted -- and then they can be instructed and we will
15 instruct them what number to use. I just think what we're
16 learning from the sparse case law on this is that this type of
17 situation arises and does not pose a problem.

18 MR. CAMPBELL: And as to that case, Your Honor --

19 THE COURT: As to the *Hashem*?

20 MR. CAMPBELL: *Hashem* I think is how you say it, yes.

21 The *Hashem* case is in apposite as well. Number one,
22 the issue there that seems to be discussed in the case, was the
23 use of what the court called evidence about inflation. And the
24 best I can correspond to that is the growth rate that would
25 be -- that enables the economist to then say, how in the future

1 exactly what Dr. Crakes did.

2 So best I can equate is this inflation notice is the
3 growth rate. But beyond that there was some form of curative
4 instruction that was given in *Hashem*. I cannot tell what it
5 is, but it was specifically referenced. And further, it has to
6 do -- it's not what we have here. What we have here is the
7 jury getting both and then being told the difference, and the
8 prejudice that befalls us is that the jury is invited by doing
9 this to gross up their number. So that --

10 THE COURT: Well, I don't see that at all because we
11 have not yet instructed the jury at all about damages. So I
12 don't see how the jury could be deciding to gross up their
13 number in order to take into account any discounting that the
14 Court might do because we simply haven't instructed them at
15 all.

16 But, Mr. Campbell, do you agree, then, that at the end
17 of the case, in the damages jury instruction, we should be very
18 clear that they are to award the nondiscounted amount if they
19 determine that damages are appropriate?

20 MR. CAMPBELL: Your Honor, I would stand on the
21 instructions that we submitted and that Your Honor is
22 reviewing. So that's the --

23 THE COURT: It's not specifically said there. I mean,
24 I looked at it, not today. I looked at it yesterday, but it's
25 not ...

1 Well, here's -- okay. But in terms of the comment
2 about the misdeeds of the witness and so on, it is clear that
3 the law -- the statute itself, the Michigan statute, does not
4 relate to the admissibility of evidence. There is no rule in
5 Michigan that this is improper evidence. So at least we -- I
6 think we can agree that there's no rule in Michigan and the
7 statute itself does not relate to evidence.

8 The jury instruction, I believe, says future value. I
9 don't think it uses discounted and undiscounted. That's what's
10 missing from it. And so in light of -- we may want to consider
11 whether we should use the words that have been used in this
12 trial so they know which they're supposed to use.

13 They'll never know that the Court is going to be the
14 one to discount it, if at all. I mean, they just won't know
15 that. They won't have any knowledge of that. They just have
16 an education on what -- when you think about money, some of you
17 think this way, discounted, and you think, nondiscounted when
18 you look in the future.

19 MR. MASON: That's the reason that it should have
20 never been brought up in the first place and the statutory
21 basis itself doesn't address the admissibility because it's so
22 clear that it is done after the fact.

23 And that's why the dearth of case law with respect to
24 the issue and the fact that the providing both numbers specific
25 as to these plaintiffs was improper.

1 THE COURT: I'll say just one more thing on this and
2 then we'll get back to the need or lack of need for a curative
3 instruction. But the standard instruction that you have
4 submitted to me clearly contemplates that a juror would be
5 educated on present and future values because the jury
6 instruction itself uses the word "future." So how could a jury
7 understand what future is if they don't understand what a
8 present value and a future value is? So I just cannot fathom a
9 world in which it is a mistrial for a jury to be -- for terms
10 in a jury instruction to be explained. I just cannot imagine
11 that world.

12 So that much we know is that I'll be denying -- or I
13 have already denied it and I'll do it again in a written order.

14 So the question is now in my mind whether any
15 curative instruction is needed at all or whether we just
16 want -- I'll let you speak, Mr. Maimon. We just want to be
17 mindful of this and craft the final jury instruction so that it
18 is just a little more clear than the standard instruction might
19 be. So that's an option.

20 Another option is to use -- I don't see any reason to
21 just strike the testimony. I think what you're telling me,
22 Mr. Campbell and Mr. Mason, is you're deeply worried about this
23 jury increasing the value of the damages because they're
24 worried that the Court is going to later decrease any amount
25 they might award. Is that what you're saying? When you say,

1 "gross up," you mean you're afraid they're going to increase
2 damages, if any, because they're worried that I'm going to
3 discount them? Right, Mr. Campbell?

4 MR. CAMPBELL: That is about right, Judge. And in
5 terms of the evidence issue that you raised, the plaintiffs
6 asked for a stipulation because it was their assumption that
7 the evidence had to be in terms of the future damages.

8 Both defendants didn't agree to that. We didn't agree
9 to whatever the plaintiff was asking us to do and that was
10 either/or and we just thought it to go with what we all agreed
11 at the time was the evidence issue.

12 Beyond that, this expert did not introduce any
13 undiscounted or present value numbers in his report because the
14 undiscounted is what --

15 THE COURT: We're past that. That's going back to the
16 motion for a mistrial, right?

17 MR. CAMPBELL: Well, it does in part, Your Honor, but
18 it also goes to show that you said there was no evidential
19 issue here and it is because the report defines the evidence
20 the expert would give and there was a request for a stipulation
21 to reduce the present value and we didn't agree to that.

22 MR. MAIMON: If I can be heard, Your Honor?

23 THE COURT: Yes.

24 MR. MAIMON: Thank you. So first of all, that
25 mischaracterizes the offer of stipulation because the offer of

1 stipulation is that the jury would award and be instructed to
2 award damages in present value as opposed to undiscounted
3 values, which is the charge, the current charge.

4 So it wasn't an evidentiary stipulation. It was a
5 stipulation as to what the jury would award. That's number
6 one.

7 Number two, once the Court has determined -- and now
8 it's done it about four times -- that the mistrial motion is
9 denied and the foundations for the arguments for a mistrial are
10 not, according to the Court's findings, valid, the continual
11 reference to misdeeds and inappropriate evidence to a jury as a
12 support for an instruction is not correct. Because the Court
13 by finding that there is no basis for a mistrial, has rejected
14 the argument that this was a misdeed or that it is in opposite
15 to the law.

16 In fact, the Hashem versus Les -- Les Stanford
17 Oldsmobile, the standard Oldsmobile case clearly states that
18 the statute at issue, which is MCL 600.6306 governs only the
19 procedure for entering an order of judgment following a
20 verdict.

21 THE COURT: Right.

22 MR. MAIMON: That's a straight quote out of the case.

23 There is no statement in this case that there was a
24 curative instruction. I don't know where Mr. Campbell or who
25 told Mr. Campbell that, but I have looked at the case several

1 times and it's not in there.

2 And the case law is clear that there is no -- there's
3 no statutory basis. There's no rule. There's no case that
4 says that this type of evidence is improper. In fact, the
5 defendants themselves as proof that this was not improper, had
6 an expert criticize Mr. -- Dr. Crakes for not reducing to
7 present value. That's their expert, Mr. Cohen or Dr. Cohen. I
8 don't know what it is and I mean no disrespect.

9 They put forward an expert who criticized Dr. Crakes
10 for not reducing it to present value, and you can't have it
11 both ways. You can't say that it's wrong of him not to do it,
12 but to do it would be a violation of court rules. And what
13 Mr. Mason says is just simple logic that it's absolutely
14 known -- although no commentary has ever said it. There's
15 no -- the comments of the issues in the pattern jury
16 instructions don't mention anything like this. There's
17 absolutely no foundation or basis for their argument.

18 So the predicate for their argument that there needs
19 to be a curative instruction is that there were misdeeds, it
20 was inappropriate and both of those are misplaced and
21 unsupported.

22 And so we believe that, A, there is no -- there is no
23 need for a curative instruction because there's nothing to cure
24 here. To the extent that anything would have to happen, we
25 believe it would only be to clarify the uses of testimony.

1 Because once the Court has already determined that there was
2 nothing wrong with the testimony, it was not a misdeed, it was
3 not inappropriate, perhaps sometimes courts will clarify things
4 for juries, but they certainly won't say that something that
5 they ruled was appropriate or not inappropriate. They
6 certainly will not strike testimony that they found was
7 appropriate, and they certainly will not tell the jury that
8 when they're at the end of the case -- and this is -- you know,
9 it's telling that when the Court gave counsel for the
10 defendants an opportunity to be heard, none of them spoke about
11 the case law or anything else and it was only after the Court
12 said your motion is denied, let's talk about the curative
13 instruction, and now they have comments about the case law.

14 But none of them discussed the civil jury instruction
15 in Michigan 53.03A which is for future damages in a personal
16 injury action and says as follows: "If you decide that a
17 plaintiff is entitled to an award of future damages, you should
18 award the full value of future damages as you determined them."

19 That's the language that Your Honor referenced, but
20 there's more language there and I think that it's telling. It
21 says as follows: "You should not reduce any award of future
22 damages to present cash value."

23 How can it be that what we're telling the jury not to
24 do is inappropriate for an expert to explain what that means?
25 Otherwise, it would have to be an entire different instruction

1 where the Court became the expert economist and started
2 explaining to the members of the jury what present cash value
3 means.

4 That's not the function of the court. That's the
5 function of testimony by experts. And so you can't just -- as
6 I mentioned in my e-mail, you simply cannot square the case
7 law, which is the *Hashem* case, the model jury instruction from
8 the state of Michigan, approved by the Supreme Court of
9 Michigan with the claim of misdeed and inappropriateness. It
10 just doesn't square. It's impossible to square.

11 We believe that there's no need to cure because
12 there's been nothing inappropriate done. To the extent that
13 the Court thinks that there needs to be clarification, we think
14 that clarification can be made. But clarification has to be
15 made in terms of the actual law and the actual instruction,
16 which is why we cited Michigan Civil Jury Instruction 53.03A in
17 our proposed alternatives.

18 MR. CAMPBELL: Your Honor, in the *Hashem* case the
19 reference to the curative instruction is Footnote 11.

20 THE COURT: I know.

21 Here's what I'm going to do -- Mr. Mason, did you have
22 something else?

23 MR. MASON: Go ahead, Your Honor.

24 THE COURT: I am going to issue a written decision on
25 the motion for a new trial, which I absolutely promise you is

1 going to remain denied. But I think in light of the case law
2 that I have been able to review since the oral decision, it's
3 well worth covering that. And I am glad that Mr. Maimon
4 brought in the Jury Instruction 53.03A to this discussion
5 because I think what it reminds me of is precisely this: That
6 the jury is going to be looking at the terms "future" and
7 "present" and there's absolutely nothing wrong with defining
8 those terms for them.

9 So -- and right now I'm inclined to look at the
10 instruction that Mr. Maimon submitted, but end it before the
11 citation to the jury instruction and just leave it there at
12 "potentially you should not reduce any award of future damages
13 to present cash value."

14 And I might add: "And you need not concern yourself
15 with the discounted numbers that were presented."

16 Something to that effect, but I'll put it in the
17 written decision.

18 MR. MAIMON: Just one comment?

19 THE COURT: Yeah.

20 MR. MAIMON: I apologize. Mr. Campbell was correct.
21 That it is in Footnote 11.

22 THE COURT: It is.

23 MR. MAIMON: But it's clear that what that curative
24 instruction was about was about a closing argument and not
25 about the evidence itself.

1 THE COURT: Okay. Thank you.

2 MR. CAMPBELL: Yes.

3 THE COURT: So I will work on that and then you will
4 receive it, but I have all of your proposals and I will take
5 them into consideration.

6 My one concern about plaintiff's proposal is that I do
7 have some concern about introducing a jury instruction
8 regarding their duty to -- with respect to damages without all
9 of the jury instructions that say that the fact that I'm
10 talking about damages, doesn't mean I think you should award
11 damages and all of those things that go along with it.

12 So to the extent that I have some concern about giving
13 any sort of damages instruction right now without the benefit
14 of all the instructions at one time.

15 So I'll just be thinking that through.

16 MR. MASON: Just a final thought. The misdeed will be
17 decided ultimately by another court apparently what Mr. Maimon
18 discusses, but the reality of the instruction is that the one
19 proposed by the plaintiff makes it worse and brings more
20 attention to it. And so we would ask the Court as the Court
21 considers both the instructions provided, take that into
22 consideration. Thank you.

23 THE COURT: Okay. Thank you.

24 Let's turn to Juror Number Nine and she did reach back
25 out to us. She did get a COVID test. It is positive. She's

1 very symptomatic. Although she's okay, but she certainly has
2 all of the classic symptoms of the current variant of COVID-19.

3 And I note that although all of the jurors are masked
4 in the courtroom, in the jury room where they can be six or
5 more feet -- approximately six feet. Well, they are at least
6 six feet from each other, they take their masks off to eat and
7 to drink. And that this particular juror has traditionally
8 worn a cloth mask and not a more protective mask. So I just
9 want to make sure you're aware of that.

10 I looked at the court's, the Eastern District of
11 Michigan Administrative Order on COVID-19, and she is certainly
12 within six feet in the jury box where generally her mask is on,
13 but again it's a cloth mask.

14 The Administrative Order from the Eastern District of
15 Michigan States that: "A person may not enter the courthouse
16 if he or she, A, has tested positive for COVID-19 within the
17 last ten days."

18 So my trial protocol says that you cannot return until
19 you're healthy and have a negative, rapid antigen test, but in
20 any event, no sooner than five days.

21 I don't know that anybody's tested whether the judge
22 gets to violate an Administrative Order. I'm not that worried
23 about the Administrative Order. But in any event, I don't
24 think she's coming back for a week to ten days.

25 I think that's a safe assumption that it will take

1 up -- she is vaccinated and she is boosted. So that may assist
2 her -- it absolutely will assist her in her recovery.

3 MR. STERN: Your Honor, do you want us to speak to
4 this?

5 THE COURT: Please.

6 MR. STERN: Okay. So we've discussed since receiving
7 Guus' E-mail and we don't think it's tenable at this point for
8 this juror to remain. As much as we don't want to lose her,
9 it's not just the COVID test, it's the COVID test plus
10 symptomatic, plus a request for two days off in June, plus what
11 appears to be an issue that we hope is resolved with being
12 paid, but for someone who previously has not made any issues of
13 coming to court being on this jury, it sure seems like over the
14 last week or so a lot of things have happened to cause this
15 juror to have some -- I don't know if skepticism is the right
16 word, but certainly some inability or disenchantment with the
17 process as the case goes on.

18 If we were to continue the case with her as a juror,
19 we are likely going to lose somewhere around two to three weeks
20 of court time because of the two days in June, what could be
21 ten days now, which is another two days -- I'm sorry, two weeks
22 in terms of court time. It's just not tenable. Mr. Mason has
23 often and raised the idea of needing to move this case along.

24 As Your Honor knows, we tried to cut our proofs, not
25 our proofs, but our witnesses to help us with our proofs to try

1 and expedite the case. It was the defendants who initially
2 believed that the case would last roughly 20 weeks. Our case,
3 short of the jury, has taken roughly ten and a half weeks,
4 which leaves them close to the same amount of time that we've
5 had to meet the 20 weeks that we informed the jury about.

6 It just -- believe me, we do not want to lose a juror.
7 I was the first one to respond this morning. It's with
8 significant regret that we say that, but we do not believe she
9 should continue and we believe she should be excused.

10 As for the other jurors, we looked at the protocols,
11 there's been nothing that requires testing of them. I don't
12 believe any of them, from what we've heard or not heard from
13 the court are symptomatic. We made a -- you know, I requested
14 months ago that we try to determine their vaccination status
15 and that was met with, you know, some heavy disfavor from some
16 folks I think who are parties to the case, whether it was the
17 Court or the other lawyers or just the rules of Eastern
18 District. We don't see any need for anything to happen at this
19 point with the other jurors unless they become symptomatic or
20 feel that they are needing to, you know, to test for some
21 reason.

22 So if it were our choice, regretfully, Juror Number
23 Nine would no longer serve and we would resume tomorrow morning
24 at nine o'clock with the nine remaining jurors unless something
25 transpires between now and then.

1 MR. CAMPBELL: Your Honor?

2 THE COURT: Let me just say -- and, Mr. Stern, you've
3 taken into consideration that other jurors may test positive in
4 light of her being within six feet with a cloth mask and in the
5 jury room without a mask?

6 MR. STERN: So I trust that the jurors will be
7 informed as to why their colleague is no longer joining them
8 for service in the event Your Honor adopts the proposal where
9 she would be dismissed as a juror. And I think that in the
10 same way that we're not requesting anyone to be vaccinated or
11 even determining their vaccination status as to the jury, the
12 jurors can determine themselves whether they believe it is
13 appropriate or not to be tested.

14 And that's how the case -- that's how -- the jury has
15 been treated a little differently than the parties in this
16 case, I think to protect their privacy and to protect their own
17 beliefs, which is why there was no issues raised as to
18 vaccination status. So whereas I may have 12 weeks ago wanted
19 everyone to be vaccinated and all of those type things, that's
20 not how the case has gone. So I think if we're going to treat
21 them at the beginning through now as though their choices and
22 their status is their decision and it's private, I think they
23 should be informed of Juror Number Nine's positive Covid test.
24 I think if they choose to get tested and they feel they should
25 get tested, they can. I also know there's a lot of people who

1 don't want to test, who are asymptomatic who feel as though
2 it's not something that they ought to have to do, that it
3 causes significant constraints on them if they test positive.

4 I'm not one of those people. I'm happy that I've been
5 negative and the Court's been requiring it. But at the same
6 time, I just don't think at this point to put something on the
7 remaining jurors is consistent with what we have done so far
8 other than to inform them that there was a positive test, they
9 may have been exposed and it's their choice as to how to
10 proceed. And if they test positive, they need to inform the
11 Court so that we can move accordingly.

12 MR. CAMPBELL: Your Honor.

13 THE COURT: Yes.

14 MR. CAMPBELL: I don't think that you have a -- we
15 have a choice or the Court has a choice here.

16 I'm looking at the order that's entered in the case
17 and that you read to the jury in the opening in paragraph
18 seven: "If the judge or a juror tests positive for COVID-19
19 and are asymptomatic, the trial will be adjourned for five
20 days --"

21 MR. MAIMON: You have to read the rest, though. You
22 have to read the rest.

23 MR. CAMPBELL: Thank you. I was trying to do that.

24 MR. MAIMON: Okay.

25 MR. CAMPBELL: "But the positive individual will

1 return after five days and one negative rapid antigen test. If
2 counsel or clients test positive --" that's not what we're
3 talking about.

4 "This decision will be made."

5 The rest really goes to -- I can read it, but it has
6 to do with counsel.

7 MR. MAIMON: No. That was the sentence I wanted
8 because the adjournment assumes that the juror is coming back.

9 MR. STERN: Yeah. The order that Your Honor entered
10 is under the assumption that Juror Number Nine is returning and
11 so it would be five days if she were asymptomatic, but we're
12 operating under the premise that she will not be returning and
13 thus that part of the order is not applicable.

14 THE COURT: My -- Mr. Mason, go ahead.

15 MR. MASON: We've taken off for Juror Number Two with
16 respect to husband issues. We've giving four days with respect
17 to another juror. Five days here, if you began with symptoms
18 that occurred yesterday, would hit Sunday.

19 And so we could -- if she tests on Sunday, we could
20 get started again on Monday or Tuesday. And there is no reason
21 to discharge this juror based on this. The whole premise of
22 the discussion with respect to we'll stop the trial if somebody
23 gets COVID, we should live up to that in terms of what we said
24 with respect to that.

25 This trial has gone longer than it should so far and

1 I'm not going to go into the specifics of all of the things
2 that I've described before for the Court, of dragging this out
3 so far. That shouldn't punish this juror who has not asked, as
4 I understand it, off, and who five days can run from yesterday
5 until Sunday. So it's workable to keep the juror, still
6 respect the CDC guidelines and move forward.

7 MR. CAMPBELL: And Your Honor --

8 MR. STERN: And this is -- this is -- the level of
9 flip-floppingness that is occurring here is just -- what was
10 the word that was used to describe our tactics regarding the
11 Crakes' evidence? I can't remember the word that Mr. Mason
12 keeps using about our conduct and how it's going to be another
13 court that decides it. I tried to put it out of my head, but
14 whatever that word is is far more applicable now to the this is
15 take too long, we need to speed it up, let's come up with time
16 limits, we're not going to do it. But now let's wait five or
17 ten days. Let's see how this juror is doing even though she's
18 not being paid, even though she lives an hour away, something
19 that she -- I mean, what are we doing here? It's amazing.

20 THE COURT: Okay. Here's my concern --

21 MR. CAMPBELL: Your Honor, I'm concerned about the
22 other jurors myself. I'm concerned about the other jurors in
23 the jury box that have been clearly exposed to COVID. And I
24 just --

25 THE COURT: I am too.

1 MR. CAMPBELL: And I just don't think it's
2 inappropriate to bring them in tomorrow when we know this juror
3 is symptomatic with COVID. I just -- if I was on that jury, I
4 wouldn't want to be here. I mean, I just -- I think that it's
5 not fair to them to bring them in tomorrow.

6 MR. MAIMON: What's the concern about bringing them
7 in? There's no further exposure. I mean, the exposure is gone
8 because she's gone.

9 THE COURT: Here's the concern that I have, which is
10 that the Court issued an Administrative Order that I want
11 to ...

12 That I don't think that I have specifically provided
13 to you. But it says that, "All trial participants, including
14 jurors, must agree to get a COVID-19 test should they develop
15 symptoms or be in close proximity with someone who has COVID-19
16 during trial and deliberations."

17 And so I think we're in a situation where it could be
18 short-sighted to dismiss Juror Number Nine because Number Ten
19 also wears a cloth mask and sits as I am -- I've only been in
20 the jury room five times or four times, and I think they sit
21 next to each other in the jury room, but they certainly sit
22 next to each other in the courtroom and Juror Number Nine was
23 coughing and sneezing yesterday in the jury room and once or
24 twice in the courtroom. And so there's definitely a close
25 proximity.

1 And what I'm afraid of, Mr. Stern and Mr. Maimon, is
2 that we dismiss Number Nine, we come back and we do a day,
3 maybe two days of trial and then Number Ten, Number Eight,
4 those who are sitting beneath -- then we just have a bigger
5 problem. And so it makes sense to me to adjourn until Monday.
6 I want to talk about Mr. Bithoney, Dr. Bithoney and his
7 availability, but I would like to ask that the jurors get a
8 test on Friday or Saturday, which is consistent with the
9 Court's Administrative Order, not my personal protocol because
10 that is Administrative Order. I don't even think it existed at
11 the time.

12 But it seem like the only way to make sure we get to
13 the finish line on this case and don't have other jurors who
14 are currently carrying -- have been exposed or carrying the
15 virus and will soon test positive and we'll be right back where
16 we were.

17 Now, from my perspective, Dr. Bithoney is obviously a
18 critical witness for plaintiffs from what has been in the
19 briefing and what I've heard thus far and read in the
20 PowerPoint. I understand your concern because he has
21 scheduling problems for next week, but I'm willing to do things
22 out of order where we fire Howard Croft's deposition -- we do
23 something to fill time on Monday and then bring in Dr. Bithoney
24 when he's available.

25 So tell me what your thoughts are on that.

1 MR. STERN: So I have multiple thoughts. Number one
2 the -- Dr. Bithoney's availability is not yet known and so we
3 need to discuss that with him before alternative arrangements
4 are made.

5 Number two, the request to relieve Juror Number Nine
6 is not simply about her COVID test. If Your Honor feels based
7 on Your Honor's interactions or your staff's interactions with
8 this juror, irrespective of whether she has asked off, if she
9 is either subtly or indirectly asking off, that's --

10 THE COURT: Let me address that. Because I gave that
11 some thought and I don't think she's disenchanted at all. I
12 think I may have misread the situation with the sneezing
13 happening the same day as she needed two days off. That, I
14 think I misread entirely. There's been no sign -- and I did a
15 little thought about this in discussion. No sign of her being
16 disenchanted in the jury room, the CSO, court security, I
17 mentioned, they think she is delightful with them, enthusiastic
18 every day to be here. So I think I may have implied that when
19 it was not the case.

20 MR. MAIMON: Okay. I think one concern, Your Honor,
21 is not only of Dr. Bithoney's scheduling concern, but it's an
22 overall scheduling concern. I think the Court had referenced
23 the difference being between symptomatic and asymptomatic and
24 whereas in this Court's COVID-19 trial protocol, it was five
25 days for an asymptomatic juror who tested positive. That is

1 correct, that it would come due on Sunday, the 22nd on my
2 calculation with a negative test on that date, could be
3 available on the 23rd to come back. And that assumes that we
4 then go forward on the 23rd. If it's ten days --

5 THE COURT: It doesn't need to be ten days.

6 MR. MASON: Even symptomatic, I think, Your Honor, the
7 CDC is five days that she can test.

8 MR. STERN: That's fine. We totally agree with what
9 the CDC.

10 MR. MAIMON: No. I'm just saying I thought the Court
11 had referenced a rule from the Eastern District --

12 MR. MASON: Judge ...

13 MR. MAIMON: -- which said -- that we haven't seen,
14 that said for symptomatic positive, there's ten days required.
15 Did I mishear?

16 THE COURT: I think that that is actually an employee
17 order.

18 MR. MAIMON: I see.

19 THE COURT: Now that I'm looking at it.

20 MR. MAIMON: I thought it said any participant in a
21 trial, including the jury or during deliberations.

22 THE COURT: Hold on.

23 MR. STERN: Amazing.

24 THE COURT: I can put the link -- is the Sharepoint
25 for the court available to all of you?

1 MR. STERN: No. Maybe the chat room?

2 THE COURT: I'm going to just put that it in the chat
3 right now.

4 MR. MAIMON: Assuming that that's a ten day
5 requirement -- and, again, that's a matter of a ruling it
6 either it is or it isn't. If it's ten days, it knocks out the
7 entirety of next week.

8 THE COURT: It doesn't have to be ten days.

9 MR. MAIMON: Okay.

10 MR. MASON: Your Honor, I'd ask you to take into
11 consideration the passion now with which they're arguing to
12 remove this juror. She's invested three months of her life in
13 this case with no ask to get off and, you know, we've made
14 accommodations for others and the fact that she's unfortunately
15 caught this virus, we should be willing to make an
16 accommodation here and not lose a juror. I'm concerned about
17 losing jurors and I think it's important we keep her investment
18 in this case involved as well.

19 MR. STERN: Your Honor, I should. Your Honor, I
20 should --

21 THE COURT: Just a minute. The other thing I should
22 say that in her voicemail, she said that she wanted direction
23 from me and from us as to what to do and that she would be
24 willing to log on to Zoom and watch the trial, so that she
25 could continue as a juror.

1 MR. MAIMON: That would be fine by us.

2 MR. STERN: I just -- if I --

3 MR. MAIMON: Let me address Mr. Mason's concerns.

4 That would be fine by us, we would love to keep her. Have her
5 by Zoom and they should be willing to stipulate to that. Let's
6 not lose time.

7 THE COURT: Okay.

8 MR. MASON: I don't think it's appropriate to make her
9 do that.

10 THE COURT: No.

11 MR. MAIMON: No, okay. Right. Okay.

12 MR. MASON: I don't want to lose her and it may be
13 that we come to that, but at this point I don't think it's
14 necessary for us to make that decision.

15 MR. STERN: I just think it's important that the
16 record --

17 THE COURT: Here's what I need: Okay. The record
18 reflects that we've all taken every position imaginable
19 throughout this trial.

20 MR. STERN: Not all of us.

21 THE COURT: Okay. Well, I probably have.

22 But what I think I need to do is look very carefully
23 at the court's Administrative Order and I would like to request
24 that the jurors take a test Friday or Saturday so that we have
25 results by Monday and report any positive tests.

1 But before going any further, I do want to know
2 what -- about the availability of Dr. Bithoney. So that -- I
3 mean, he is critical -- we can't finish the case until he's
4 available, so we have to know about him. So can you get back
5 to me, Mr. Stern?

6 MR. STERN: If you'll hold on right now, I'll go in
7 the other room and I'll call him.

8 MR. MAIMON: Let's have an opportunity to talk to him.

9 THE COURT: Yeah. Okay. And so I'll get back to you
10 as soon as I hear back, Mr. Stern, and Mr. Maimon will copy
11 everyone on his availability.

12 MR. MAIMON: So if I understand correctly, Your Honor,
13 our plan going forward is we're going tell the jurors not to
14 come in either tomorrow or Thursday, that they should test
15 Friday or Saturday, but in any event in enough time to know for
16 Sunday afternoon if there's a problem and let us know. It
17 would be our plan to proceed next week with evidence on Monday
18 and finish Dr. Bithoney when he's available to come back?

19 THE COURT: Yes. And I turned immediately to the
20 Howard Croft deposition objections. And I'm on page 200. I
21 didn't get very far, but now I will have time to finish that.
22 So that will be available to you.

23 MR. STERN: So the defendants, just so we know, are
24 okay with Mr. Croft's deposition being the first witness that
25 they call? Because they indicated previously -- I'm imagining

1 a scenario where Dr. Bithoney is unavailable and so we put our
2 case on pause with no further witnesses, and then we move to
3 the defense case. They previously said that they do not want
4 to play a video as their first witness. That was a position
5 that they took late last week. So now I just want to confirm
6 that we would be moving forward with the Croft deposition if
7 Dr. Bithoney is unavailable as the first witness called; is
8 that right.

9 MR. CAMPBELL: Am I being asked the question by the
10 counsel?

11 THE COURT: Yes.

12 MR. STERN: Yes.

13 MR. CAMPBELL: Well, first of all, we're in
14 substantially changed circumstances. So to suggest that, yes,
15 I didn't want to start the case with a video, but since the
16 plaintiff's case is not over and that's fine. I mean, we've
17 all been in situations where you take things out of order. But
18 in this sense, I think it probably makes sense to use a video.

19 Croft is available. We'll think about it this
20 afternoon and if there's another one, Your Honor, we'll get it
21 to you immediately.

22 THE COURT: Okay.

23 MR. STERN: May I make a suggestion, then?

24 THE COURT: Yes.

25 MR. STERN: If Howard Croft -- if the video is going

1 to be played, why would it be objectionable to allow the jury
2 to watch the Howard Croft video remotely?

3 THE COURT: Because I would need to set protocols of
4 who can be in the room, what -- I mean, it's just a little more
5 complicated than just saying fire up your iPhone and take a
6 walk and listen to Howard Croft. So I'm not saying it can't be
7 done and maybe it will be done, but it can't be done this
8 afternoon.

9 MR. STERN: So I would request -- and then I'll shut
10 up because clearly everyone is tired of hearing my voice. But
11 I would request that whatever the protocols are that are
12 necessary for that, out of an abundance of caution in light of
13 the fact that there's significant concern from some of the
14 folks on the phone about the health and safety and the COVID
15 issues for the other jurors, in light of that fact, we ought to
16 have that protocol in place in the event that another juror
17 tests positive or if this juror remains symptomatic after
18 Sunday. Because to lose any more time, as Mr. Mason has
19 repeatedly said, would just be really unfair to the parties to
20 have this drag on -- and to the jurors to have it drag on
21 further than it needs to.

22 MR. CAMPBELL: And, Your Honor, you know what would
23 really be unfair under these circumstance, these COVID
24 protocols were set forth at the start of the trial. We talked
25 about them at length. The plaintiffs were perfectly fine with

1 five days off and ten days off while they were putting their
2 case on. To now suggest that it's just okay that we have to
3 present our case over Zoom, that is unfair.

4 THE COURT: Well, no. There's a lot of scenarios for
5 what happens in the future. One of our judges, Judge Mark
6 Goldsmith, conducted a civil jury trial over Zoom. I'll get a
7 hold of his protocols, but we're not at that point at all. And
8 he selected the jury with that in mind and he selected it over
9 Zoom, and we didn't do that. And we don't know about what's
10 going on at people's homes and so on, whether they have
11 internet connection and all of that.

12 MR. MASON: And it would be inappropriate to let the
13 plaintiff put their case on live to the jury and we don't get
14 that benefit.

15 THE COURT: Understood.

16 MR. CAMPBELL: A Zoom trial is one thing, but
17 plaintiffs in person and defense on Zoom, that's entirely --

18 THE COURT: I hear you absolutely. I think the idea
19 was one juror and not the whole jury for one day of testimony
20 or something like that. But still, I'm going to look into
21 it to see what it is, but I certainly hear you about
22 shifting -- I'm not anywhere near shifting this whole jury to
23 Zoom. No, not at all.

24 So, okay. Anything else today unrelated to these two
25 issues that we've discussed?

1 MR. CAMPBELL: Thank you, Your Honor. We'll get back
2 to you as quickly as possible if there is another video that we
3 want to have on Monday.

4 THE COURT: Okay.

5 MR. CAMPBELL: Okay.

6 THE COURT: And I'll keep working on Howard Croft and
7 I may, once I finish one volume, I'll send it to you so you can
8 start working on it instead of waiting. Is one volume about
9 how many hours?

10 MR. MAIMON: No way to know.

11 THE COURT: Bobby knows.

12 MR. STERN: It's not -- all volumes are not created
13 equally because you're taking testimony from a volume and some
14 volumes may have less testimony, for instance, the McLaren
15 components and the legionella components. So many of these
16 depositions are not being used and those in certain
17 circumstances take up significant parts of the certain volumes.

18 THE COURT: Okay. I'll just keep going.

19 MR. STERN: Thanks.

20 MR. CAMPBELL: Thank you.

21 THE COURT: All right.

22 MR. MAIMON: I do think, Your Honor, it was helpful to
23 us when Your Honor had made it through a volume to send it. I
24 think the technicians are able to process that easier and I do
25 think that helps. So thank you.

1 THE COURT: Okay. Good.

2 MR. CAMPBELL: Your Honor.

3 THE COURT: Also I feel I have accomplished something
4 as opposed to not.

5 All right. Thank you. And so we'll hear you from
6 you, Mr. Stern and Mr. Maimon about Mr. -- Dr. Bithoney's
7 availability?

8 MR. STERN: Yeah.

9 THE COURT: And I will communicate this request for
10 the jurors to test and my assumption is that we'll be back in
11 session at 9:00 a.m. on Monday morning. If there are issues,
12 we need to discuss between now and then, we can have a Zoom
13 hearing, if needed.

14 MR. CAMPBELL: Thank you very much.

15 (At 4:57 p.m., matter concluded.)

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C E R T I F I C A T E

I, Darlene K. May, Official Court Reporter for the United States District Court, Eastern District of Michigan, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

May 18, 2022
Date

/s/ Darlene K. May
Darlene K. May, CSR, RPR, CRR, RMR
Federal Official Court Reporter
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